

**BEFORE THE WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD**

BETTER BRINNON COALITION,

Petitioner,

v.

JEFFERSON COUNTY,

Respondent.

No. 03-2-0007

**COMPLIANCE
ORDER**

This Matter comes before the Board upon a compliance hearing held pursuant to the Amended Final Decision and Order in this case (November 3, 2004). The compliance hearing was held on April 13, 2004 in Port Townsend.¹ The Petitioner was represented by Mark Rose. Nancy Dorgan also participated as a Participant, the County agreeing that she qualifies as “a person with standing to challenge the legislation enacted in response to the board’s final order”. RCW 36.70A.330(2) The County was represented by attorney Mark Johnsen. Al Scalf, director of the department of community development, and Josh Peters, associate planner, were also present for the County. All three board members attended.

I. SUMMARY OF DECISION

The Amended Final Decision and Order found the County out of compliance with the Growth Management Act (GMA) and the State Environmental Policy Act (SEPA) with respect to two aspects of the Brinnon Subarea Plan: (1) the Light Industrial LAMIRD proposed for Brinnon, and (2) the supplemental environmental impact statement (SEIS) for the Brinnon Subarea Plan. Amended Final Decision and Order, November 3, 2003, Conclusions of Law F and G.

¹ The timing of this decision was significantly delayed by technological difficulties experienced by the Board. The Board apologizes for any inconvenience this may have caused.

In response, the County has proposed a new type (d)(iii) LAMIRD in the same location that it had proposed the Light Industrial LAMIRD, adjacent to the Brinnon Rural Village Center LAMIRD (type (d)(i)). The County also performed a supplemental environmental analysis to address fish and wildlife habitat concerns in the Brinnon Subarea Plan. We find that that the proposed new type (d)(iii) LAMIRD may not be located next to the Brinnon Rural Village and still be “isolated”; but that the County has achieved compliance with respect to SEPA in the Brinnon Subarea Plan.

II. BURDEN OF PROOF

Unless there has been a prior determination of invalidity, comprehensive plans, development regulations and amendments to them are presumed valid upon adoption. RCW 36.70A.320(1). The burden is on the Petitioner to demonstrate that any action taken by the County is not in compliance with the requirements of Ch. 36.70A RCW. RCW 36.70A.320(2). The Board shall find compliance unless it determines that the actions taken are clearly erroneous based upon the record before the board and in light of the goals and requirements of the Growth Management Act. RCW 36.70A.320(3).

III. ISSUES PRESENTED

Issue No. 1: Does the new type (d)(iii) LAMIRD proposed to be located adjacent to the Brinnon Rural Village Center meet the requirements of RCW 36.70A.070(5)?

Issue No. 2: Does the County’s environmental analysis of the Brinnon Subarea Plan comply with the State Environmental Policy Act (SEPA)?

Positions of the Parties

The County submitted its Report on Compliance/Statement of Actions Taken on February 18, 2004. This report includes the final draft of the Environmental Analysis undertaken in response to the Board’s finding of non-compliance. Jefferson County’s Report on Compliance/Statement of Actions Taken, Environmental Analysis, Exhibit

#3-100. The County states that it undertook the environmental analysis after an “informal scoping” meeting with tribal representatives and the Washington State Department of Fish and Wildlife and it addressed the issues raised by the tribes and the department in the environmental analysis. *Id.*

In response to the finding that the Light Industrial LAMIRD proposed for Brinnon does not comply with the GMA, the County proposes a New Small Business Cottage Industry Overlay, a type (d)(iii) LAMIRD, in the same location. “The intent is to provide job opportunities for rural residents, more specifically for residents of Brinnon.” County’s Report on Compliance/Statement of Actions Taken at 9.

Participant objects to the proposed (d)(iii) LAMIRD on the grounds that there are no restrictions on the number of structures allowed in the overlay, that the uses are not limited to be small-scale, and because the overlay would allow continuous commercial uses that would not be isolated as required by the GMA. Statement of Nancy Dorgan.

Petitioner objects to the SEPA review, arguing that the environmental analysis includes only a three sentence analysis of the 21.6 acre “Dosewallips Small-scale Business and Cottage Industry Overlay District” and that the County should make sure that the tribes and the department “sign off” on the analysis. February 19, 2004 e-mail of Mark Rose.

Participant further objects that the impacts of commercial and industrial development are not the same as the impacts of residential development. Statement of Nancy Dorgan; Ex. 13-50. She argues that the impervious surface cap would have a different impact for four houses under current zoning than for “an unlimited assortment of commercial and industrial uses.” *Id.*

Board Discussion

Issue No. 1: Does the new type (d)(iii) LAMIRD proposed to be located adjacent to the Brinnon Rural Village Center meet the requirements of RCW 36.70A.070(5)?

In our Final Decision and Order issued in this case issued on August 22, 2003, we found that the proposed Light Industrial LAMIRD for the Brinnon flats area did not fit the criteria for a type (d)(i) LAMIRD under RCW 36.70A.070(5)(d)(i). The County has responded by denominating the same LAMIRD a type (d)(iii) LAMIRD.

The 1995 amendments to RCW 36.70A.070 created provisions for “limited areas of more intense rural development”, generally referred to as “LAMIRDs”. LAMIRDs may be adopted in rural lands where the county has adopted measures to “minimize and contain the existing areas or uses” of LAMIRDs. RCW 36.70A.070(5)(d). The statute provides for three types of LAMIRDs, each with different characteristics and also different limitations. Type (d)(i) LAMIRDs may allow mixed uses. RCW 36.70A.070(d)(i). Type (d)(ii) LAMIRDs contain small-scale recreational and tourist uses. RCW 36.70A.070(d)(ii). Type (d)(iii) LAMIRDs contain isolated nonresidential uses, including cottage industries and small-scale businesses. RCW 36.70A.070(5)(d)(iii).

Originally, the Brinnon Subarea Plan envisioned a light industrial LAMIRD adjacent to the Rural Village Center in Brinnon. The Rural Village Center is a designated type (d)(i) LAMIRD which was the subject of the initial challenge in this case; the Board upheld the LAMIRD designation for the Rural Village Center but not for the light industrial LAMIRD. Amended Final Decision and Order, November 3, 2003.

The County now has designated the same area that was proposed for a light industrial LAMIRD in Brinnon as a type (d)(iii) LAMIRD - “the Dosewallips Small-scale Business and Cottage Industry overlay district.” LNP 6.1.14, Jefferson County Comprehensive Plan. It is abbreviated “SBCI”. UDC §3.6.15.

To qualify as a type (d)(iii) LAMIRD, the SBCI must meet the criteria of RCW 36.70A.070(5)(d)(iii):

The intensification of development on lots containing isolated nonresidential uses or new development of isolated cottage industries and isolated small-scale businesses that are not principally designed to serve the existing and projected rural population and nonresidential uses, but do provide job opportunities for rural residents. Rural counties may allow the expansion of small-scale businesses as long as those small-scale businesses conform with the rural character of the area as defined by the local government according to RCW 36.70A.030(14). Public services and public facilities shall be limited to those necessary to serve the isolated nonresidential use and shall be provided in a manner that does not permit low-density sprawl.

The Participant challenges both the isolated nature of the SBCI LAMIRD as well as the small-scale character of the cottage industry and business allowed within the new LAMIRD. Ex. 13-50.

We note at the outset that type (d)(iii) LAMIRDs do, as the County maintains, allow new development on “lots” rather than requiring the County to determine logical outer boundaries for the LAMIRD as is provided for type (d)(i) LAMIRDs based on the pre-existing built environment as of July 1990. RCW 36.70A.070(5)(d)(iv); *Durland v. San Juan County*, WWGMHB Case No. 00-2-0062c (Final Decision and Order, May 7, 2001). However, the type (d)(iii) LAMIRD must meet the requirements of RCW 36.70A.070(5)(d)(iii) and is not merely the same thing as a type (d)(i) LAMIRD without the requirement of a logical outer boundary established in accordance with the built environment as of July 1990.

The first question is whether the SBCI LAMIRD appropriately contains “isolated” cottage industry and small-scale businesses. The County argues that the term

“isolated” refers to the area in which the LAMIRD is located. That is, that cottage industry and small-scale business is allowable as a type (d)(iii) LAMIRD if it is located in an isolated part of the county. Participant, on the other hand, argues that the cottage industry and small-scale business must itself be isolated from other similar uses. Ex. 13-50. Because the proposed overlay LAMIRD would be located adjacent to the Brinnon Rural Village Center (a type (d)(i) LAMIRD) and because it allows multiple commercial uses within it, Participant argues that it does not meet the requirement for “isolated” uses.

In construing the statute, the fundamental objective is to carry out the intention of the Legislature. *State v. J.M.*, 101 Wn. App. 716, 725, 6 P.3d 607, 2000 Wash. App. LEXIS 1452 (Div. I). The words used by the Legislature must be viewed in their ordinary grammatical sense unless this leads to an absurd or contradictory result. *Treat v. White*, 181 U.S. 264, 21 S.Ct. 611, 1901 US LEXIS 1364 (1901), citing with approval Sedgwick, Construction of Statutory and Constitutional Law 220. To ascertain the thought which is expressed, “the first resort in all cases is to the natural signification of the words employed, in the order of grammatical arrangement in which the framers of the instrument had placed them.” *State ex. rel. Billington v. Sinclair*, 28 Wn.2d 575, 579-80, 1947 Wash. LEXIS 444 (1947).

Here, the statute refers to “lots containing isolated nonresidential uses or new development of isolated cottage industries and isolated small-scale businesses”. First we observe that the term “isolated” is used repeatedly to modify the type of use allowed in the type (d)(iii) LAMIRD. The terms “cottage industries” and “small-scale businesses” are both modified by the term “isolated”. There is no ambiguity about the application of the term “isolated” to both types of uses.

Second, we note that the term “isolated” is *not* used to modify “lots”. The lots described in the statute contain isolated uses but the lots themselves are not defined as

“isolated”. We therefore conclude that the statute is referring to isolated uses rather than to isolated lots. If it were sufficient for the location to be isolated or remote as the County argues, then the term “isolated” would have been applied to “lots” rather than (or in addition) to “cottage industries” and “small-scale businesses”.

Our inquiry does not end there, however. We must still decide what it means for the uses to be isolated. Participant argues that the term “isolated” must “at least include the notion that the new (d)iii LAMIRD is discontinuous from other commercial development”. Ex. 13-50 (Comment letter of Nancy Dorgan). Because the Brinnon Rural Village Center is a mixed-use type (d)(i) LAMIRD, she argues, the new overlay would mean that commercial uses would be allowed in two adjacent LAMIRDs. *Id.*

The dictionary indicates that the derivation of the word “isolate” comes from the Latin “insula” meaning “island.” “Isolate” is defined as “to set apart from others; place alone.” Webster’s New World Dictionary of the American Language, College Edition. An isolated use, then, must be one that is set apart from others. The Legislature’s use of the term “isolated” for both cottage industry and small-scale businesses demonstrates an unambiguous intention to ensure that any commercial uses established by the mechanism of a type (d)(iii) LAMIRD be set apart from other such uses.

It is also important to remember that a central requirement of all LAMIRDs is that they contain the uses and areas of more intense rural development. RCW36.70A.070(5)(d)(iv). Further, pursuant to RCW 36.70A.070(5)(c), every county must assure that rural development is contained and that inappropriate conversion of undeveloped land into sprawling, low-density development is reduced in the rural areas. RCW 36.70A.070(5)(c)(i) and (iii). We question whether side-by-side LAMIRDs can be said to contain the areas of more intense development, particularly

when the proposed type (d)(iii) LAMIRD is for the purpose of allowing new development.

Our sister board, the Central Puget Sound Growth Management Hearings Board, has held that LAMIRDs must not be in too close proximity to UGA boundaries because such location would promote the low-density sprawl that the LAMIRDs are required to avoid. *City of Tacoma, et al., v. Pierce County*, CPSGMHB Case No. 99-3-0023c (Final Decision and Order, June 26, 2000). A similar point may be made with respect to LAMIRDs. Neither the uses nor the areas of growth are contained when they spread from one to the other.

The desire of the Brinnon area residents to develop jobs in the region is certainly understandable and we agree that the GMA includes a goal to encourage economic development. RCW 36.70A.020(5). However, economic development may not occur at the expense of creating low-density sprawl. If new type (d)(iii) LAMIRDs could be created for commercial development abutting other LAMIRDs, it would be possible to create strip malls or other stretches of more intensive rural development throughout the rural areas. This would encourage sprawl in the rural areas rather than containing limited amounts of development in the rural zone as envisioned by the Act.

We therefore find that the proposed new type (d)(iii) LAMIRD does not comply with RCW 36.70A.070(5)(c)(i) and (iii), and 36.70A.070(5)(d)(iii) and (iv) because it connects a new area of more intense rural uses to an existing LAMIRD which allows the same kinds of uses, the Brinnon Rural Village Center. LAMIRDs must limit and contain growth, not extend it from one LAMIRD to the next.

Because we find that the proposed new overlay type (d)(iii) LAMIRD may not be located so that it extends more intense rural development rather than containing and reducing it, we do not reach the question of the extent to which a type (d)(iii) LAMIRD may contain multiple cottage industries or small-scale businesses or the

question of what constitutes “small-scale”. The answers to these questions will have to await another day.

Conclusion: The proposed type (d)(iii) LAMIRD at Brinnon fails to comply with the requirements of RCW 36.70A.070(5)(c)(i) and (iii), 36.70A.070(5)(d)(iii) and (iv).

Issue No. 2: Does the County’s environmental analysis of the Brinnon Subarea Plan comply with the State Environmental Policy Act (SEPA)?

In the Amended Final Decision and Order, November 3, 2003, this Board found that the earlier analysis failed to evaluate the probable significant adverse environmental impacts on fish and wildlife habitat. Amended Final Decision and Order at 37. Comments had been submitted in response to the County’s SEIS that raised concerns about the potential for significant environmental impacts upon fish and wildlife habitat but the County had not addressed them. Based upon WAC 197-11-060, the Board required the County to undertake an analysis that considers the likely significant environmental impacts of the Brinnon Subarea Plan.

Upon the Board’s finding that the original environmental analysis of the Brinnon Subarea Plan had failed to address the significant issues raised by affected tribes and the department of fish and wildlife (WDFW), the County met with representatives of the Port Gamble S’Klallam Tribe and the WDFW. From this meeting, the County undertook further analysis of the impacts of “pollution generating impervious surfaces”; water quality; potential wildlife habitat needs; and identified issues that would have to be analyzed with any proposed Master Planned Resort at Black Point. Appendix A to Ex. 3-100.

The County’s analysis compares the environmental impacts of uses allowed prior to adoption of the Brinnon Subarea Plan (BSP) with the impacts of the uses allowed under the BSP. This analysis supplements the supplemental environmental impact

analysis and 2002 Staff Report that were prepared in association with the original adoption of the Brinnon Subarea Plan. Ex. 3-100 at 1.

With the additional environmental analysis presented in Ex. 3-100, the County has addressed water quality in areas of existing development by sampling water in Walcott Slough and Syoplash Slough; and analyzed the typical stormwater pollutants in terms of impervious surfaces. Ex. 3-100, at 3-6. Water quality issues are key to the impact of development on fish habitat. The environmental analysis identifies existing high quality habitat and primary wildlife corridors. Ex. 3-100, at 6-7 and Appendix C. It analyzes the likely impact of development upon the primary high quality habitat on the eastern border of the Brinnon Rural Village Center and highlights that area for special attention on the permit level. *Id.*

The environmental analysis is entitled to the same presumption of validity as is accorded comprehensive plans, development regulations and amendments to them:

Except as otherwise provided in subsection (4) of this section, the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter.

RCW 36.70A.320(2)

Both the Petitioner and the Participant challenge the adequacy of the environmental analysis of the proposed SBCI overlay (type (d)(iii) LAMIRD). However, the adequacy of the analysis of the SBCI is not before us because we have already determined that the proposed LAMIRD fails to comply with RCW 36.70A.070(5)(c)(i) and (iii), and (d)(iii) and (iv). No one argues that the supplemental environmental analysis of Ex. 3-100 fails to address the fish and wildlife habitat issues outside of the proposed SBCI overlay which were the subject of the Board's last order.

Conclusion: We find that the County is in compliance with SEPA with respect to the environmental analysis of the Brinnon Subarea Plan.

IV. FINDINGS OF FACT

- 1) Jefferson County is a county located west of the crest of the Cascade Mountains that has chosen to or is required to plan pursuant to RCW 36.70A.040.
- 2) Petitioner and Participant have participated orally and/or in writing before the county on the matters being reviewed in this order.
- 3) In response to the Board's findings of noncompliance in the Amended Final Decision and Order issued November 3, 2003, the County adopted amendments to its comprehensive plan, LNP 6.1.14, LNP 6.2.17, and LNP 11.3.4 (Brinnon Subarea Plan 2004 growth management compliance); amendments to its UDC, 3.6.1(7), 3.6.12(a)(2)(iv), 3.6.12(b)(2)(i) and (vi), 3.6.15(a),(b) and (c), 3.7(a)(iii), 4.17(3), 4.20.4, 8.1(4); and Environmental Analysis of Brinnon Subarea Plan and Associated Comprehensive Plan and UDC Amendments (Ex. 3-100).
- 4) The Brinnon Rural Village Center is a designated type (d)(i) LAMIRD which was the subject of the initial challenge in this case; the Board upheld the LAMIRD designation for the Rural Village Center.
- 5) The Board found that the light industrial LAMIRD proposed for Brinnon did not meet the requirements for a type (d)(i) LAMIRD. Amended Final Decision and Order, November 3, 2003.
- 6) The County now has designated the same area that was proposed for a light industrial LAMIRD in Brinnon as a type (d)(iii) LAMIRD - "the Dosewallips Small-scale Business and Cottage Industry overlay district." LNP 6.1.14, Jefferson County Comprehensive Plan. It is abbreviated "SBCI". UDC §3.6.15.
- 7) The proposed overlay SBCI LAMIRD would be located adjacent to the Brinnon Rural Village Center (a type (d)(i) LAMIRD) and it allows multiple commercial uses within it.
- 8) The Legislature's use of the term "isolated" for both cottage industry and small-scale businesses in RCW 36.70A.070(5)(d)(iii) demonstrates an

unambiguous intention to ensure that any commercial uses established by the mechanism of a type (d)(iii) LAMIRD be set apart from other such uses.

- 9) A central requirement of all LAMIRDs is that they contain the uses and areas of more intense rural development. RCW36.70A.070(5)(d)(iv).
- 10) Every county must assure that rural development is contained and that inappropriate conversion of undeveloped land into sprawling, low-density development is reduced in the rural areas. RCW 36.70A.070(5)(c)(i) and (iii), and 36.70A.070(5)(d)(iv).
- 11) LAMIRDs must limit and contain growth, not extend it from one LAMIRD to the next.
- 12) The proposed new type (d)(iii) LAMIRD (SBCI) does not comply with RCW 36.70A.070(5)(d) because it connects a new area of more intense rural uses to an existing LAMIRD which allows the same kind of uses, the Brinnon Rural Village Center.
- 13) In the Amended Final Decision and Order, November 3, 2003, this Board found that the earlier analysis failed to evaluate the probable significant adverse environmental impacts on fish and wildlife habitat.
- 14) The County met with representatives of the Port Gamble S'Klallam Tribe and the WDFW in October 2003 to identify potential significant environmental impacts of the Brinnon Subarea Plan on fish and wildlife that should be added to the County's earlier environmental analysis.
- 15) From this meeting, the County undertook further analysis of the impacts of "pollution generating impervious surfaces"; water quality; potential wildlife habitat needs; and identified issues that would have to be analyzed with any proposed Master Planned Resort at Black Point.
- 16) The County's analysis compares the environmental impacts of uses allowed prior to adoption of the Brinnon Subarea Plan (BSP) with the impacts of the uses allowed under the BSP.
- 17) The County has addressed water quality in areas of existing development by sampling water in Walcott Slough and Syoplash Slough.
- 18) The County's environmental analysis evaluated typical stormwater pollutants in respect to impervious surfaces in the potential development area.

- 19) The environmental analysis identifies existing high quality habitat and primary wildlife corridors, analyzes the likely impact of development upon the primary high quality habitat on the eastern border of the Brinnon Rural Village Center, and highlights subjects for special attention in processing permits for any master planned resort in Black Point.
- 20) No party argues that the supplemental environmental analysis of Ex. 3-100 fails to address the fish and wildlife habitat issues outside of the proposed SBCI overlay which were the subject of the Board's last order. The supplemental environmental analysis is entitled to the presumption of validity.

V. CONCLUSIONS OF LAW

- A. This Board has jurisdiction over the parties and subject matter of this compliance proceeding.
- B. Petitioner and Participant have standing to challenge the County's actions to achieve compliance in this case.
- C. The comprehensive plan and development regulations adopted by the County with respect to the new proposed SBCI overlay (comprehensive plan provisions LNP 6.1.14, LNP 6.2.17, and LNP 11.3.4 and UDC provisions 3.6.1(7), 3.6.12(a)(2)(iv), 3.6.12(b)(2)(i) and (vi), 3.6.15(a),(b) and (c), 3.7(a)(iii), 4.17(3), 4.20.4, 8.1(4)) fail to comply with RCW 36.70A.070(5)(c)(i) and (iii), and 36.70A.070(5)(d)(iii) and (iv).
- D. The County's environmental analysis of the Brinnon Subarea Plan complies with the State Environmental Policy Act (SEPA).

VI. ORDER

The County shall achieve compliance with respect to the proposed SCBI overlay (type (d)(iii) LAMIRD) within 90 days of the date of this order. The County shall submit a report to the Board within ten days thereafter and serve copies on Petitioner and Participant on the same date. Any objections to a finding of compliance must be in writing and filed with the Board within two weeks of the filing of the County's report. The County's response to any such objections shall be due two weeks thereafter. The following schedule shall apply:

October 1, 2004	County's Report on Compliance Due
October 18, 2004	Written Objections to a Finding of Compliance Due
November 1, 2004	County's Reply Due
November 10, 2004	Compliance Hearing

The participants will be notified of the time and location of the compliance hearing, which may be telephonic.

This is a final decision pursuant to WAC 242-02-832 and RCW 36.70A.300(5) upon which review may be sought in accordance with Ch. 34.05 RCW.

SO ORDERED this 23rd day of June, 2004.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Margery Hite, Board Member

Nan Henriksen, Board Member

Holly Gadbaw, Board Member